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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 ROBERT BOLICK,

11 Plaintiff,

12 v.

13 ROBERT A. PASIONEK, et al.,

14 Defendants.
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Case No. 2:10-CV-00353-KJD-GWF

ORDER

16 Currently before the Court is Plaintiff's Motion to Strike (#14). Defendant filed a Response
17 in Opposition (#19), to which Plaintiff filed a Reply (#21). Specifically, Plaintiff seeks that the
18 Court issue an order striking Paragraphs 29 and 30 of Defendant's Counterclaim pursuant to Rule
19 12(f) of the Federal Rules of Civil Procedure on the grounds that the allegations in those paragraphs
20 are "redundant, immaterial, impertinent, and scandalous" and may cause severe prejudice to
21 Defendant. (#14 at 2.)

22 **I. Background**

23 This case arises from an employment agreement between Plaintiff Robert L. Bolick, as the
24 sole equity owner of the law firm Bolick & Boyer ("referred to herein as "Bolick & Boyer" or the
25 "Firm"), and attorney Robert Pacionek ("Pacionek"). On or about December 30, 2008, Bolick &
26 Boyer entered into an employment agreement with Pacionek under which Pacionek was to earn a

1 monthly draw of \$25,000.00 annualized to \$300,000.00 commencing on December 16, 2008. Then,
2 between December 16, 2008, and April 15, 2009, the Firm advanced Pasioneck \$25,000.00 per month
3 for a total of \$100,000.00, reimbursed travel and business expenses, and paid for medical and dental
4 insurance for Pasioneck and his family pursuant to the terms of the employment agreement.

5 The Complaint alleges that between December 16, 2008, and April 15, 2009, Pasioneck did
6 not bill any hours or collect any money for the Firm and resultantly, the Firm terminated Pasioneck's
7 employment for cause. Additionally, the Firm has demanded that Pasioneck pay the negative balance
8 on his draws for said four months, under the terms of the agreement. On or about May 27, 2009, the
9 parties "settled their differences" and developed an Amended Agreement that reinstated many of the
10 terms of the original Agreement. Subsequently however, Pasioneck stopped appearing at the Firm's
11 offices, and is alleged to have begun working for another law firm in July, 2009. In August, 2009,
12 Pasioneck allegedly contacted Bolick & Boyer to terminate the Amended Agreement.

13 Bolick & Boyer brought its Complaint in State Court on December 8, 2009, alleging six
14 claims for relief: (1) Breach of Agreement; (2) Breach of the Covenant of Good Faith and Fair
15 Dealing; (3) Intentional Misrepresentation; (4) Negligent Misrepresentation; (5) Unjust Enrichment;
16 and (6) Accounting. The Complaint seeks compensatory and punitive damages. In response,
17 Pasioneck removed the case to federal court, (see #1) and shortly thereafter filed an Answer, with
18 Affirmative Defenses, and Counterclaim. (#4.) Pasioneck's Counterclaim raises eight claims for
19 relief against Bolick & Boyer: (1) Breach of Contract; (2) Breach of Implied Covenant of Good Faith
20 and Fair Dealing; (3) Fraud; (4) Negligent Misrepresentation; (5) Defamation; (6) False Light; (7)
21 Alter Ego/Piercing the Corporate Veil; and (8) Declaratory Relief. Pasioneck alleges inter alia that he
22 never executed the Amended Agreement at issue, that he was induced to join the Firm in spite of the
23 Firm's inability to meet financial obligations, and that Robert Bolick made defamatory and malicious
24 statements about Pasioneck that have caused prejudice and suffering. Pasioneck denies liability and
25 argues that the Firm is not entitled to recover any attorney fees or costs. (See #4.)
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1 Bolick & Boyer's instant Motion seeks that the Court strike two paragraphs of Pasioneck's
 2 Counterclaim pursuant to Fed. R. Civ. P. 12(f). Specifically, Bolick & Boyer aver that paragraphs 29
 3 and 30 of the Counterclaim are redundant, immaterial, impertinent, and scandalous, and seek only to
 4 create an avenue through which Pasioneck may harass the Firm with unnecessary and unrelated
 5 discovery requests and allegations.

6 **II. Legal Standard**

7 Under Fed. R. Civ. P. 12(f) a "court may strike from a pleading . . . any redundant,
 8 immaterial, impertinent, or scandalous matter." Matter is considered "immaterial" if it has no bearing
 9 on the controversy before the Court. In re TheMart.com, Inc. Sec. Litig., 114 F.Supp. 2d 955, 965
 10 (C.D. Cal. 2000). Allegations are "impertinent" if they are not responsive to the issues that arise in
 11 the action and are inadmissible as evidence. Id. "Scandalous" matter has been described to include
 12 allegations that cast a cruelly derogatory light on a party or other person. Id. (citing Skadegaard v.
 13 Farrell, 578 F. Supp. 1209, 1221 (D.N.J. 1984).

14 A Rule 12(f) motion is considered a "drastic remedy" that is "generally disfavored" by federal
 15 courts. Nevada Fair Housing Center, Inc. v. Clark County, 565 F.Supp.2d 1178 (D. Nev. 2008)
 16 (citing Germaine Music v. Universal Songs of Polygram, 275 F.Supp.2d 1288, 1300 (D.Nev. 2003);
 17 See also Bureerong v. Uvawas, 922 F.Supp. 1450, 1478 (C.D.Cal.1996) ("Rule 12(f) motions are
 18 generally disfavored because they are often used as delaying tactics, and because of the limited
 19 importance of pleadings in federal practice.") (cites and quotes omitted).

20 Despite its general disfavor, however, a district court's ruling on a motion to strike is
 21 reviewed only for an abuse of discretion. See Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.
 22 397 F.3d 1217, 1224 n.4 (9th Cir. 2005). This is because the essential function of a Rule 12(f)
 23 motion is to "avoid the expenditure of time and money that must arise from litigating spurious issues
 24 by dispensing with those issues prior to trial." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir.
 25 1993)(rev'd on other grounds Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994)).

1 **III. Discussion**

2 Here, the paragraphs of Defendant's Counterclaim that Plaintiff seeks to have stricken state
3 the following:

4 29. Upon information and belief, Bolick & Boyer withdrew funds from client trust
5 accounts, including Pasioneck's clients' accounts, in order to cover payroll expenses
prior to billing clients for any services provided.

6 30. Upon information and belief, Bolick & Boyer prepared and presented fraudulent
7 financial statements, including a "phantom" lease to a federal banking institution to
8 procure refinancing of an office building occupied by Bolick & Boyer, located at
10785 West Twain Avenue, Suite 200, Las Vegas, Nevada 89315 and owned by
principals of Bolick & Boyer.

9 Counterclaim at ¶¶ 29–30.

10 **A. Paragraph 29**

11 Defendant argues that the allegations regarding Bolick & Boyer's alleged misuse of client
12 trust funds is pertinent to this litigation because it is "part and parcel of Bolick & Boyer's overall
13 scheme to defraud Pasioneck by misrepresenting the financial condition of the law firm." (#19 at 2.)

14 Defendant argues that a Rule 12(f) motion to strike should be granted only if the allegations
15 complained of "have no possible relation to the controversy" and "its presence in the pleading will
16 cause prejudice which cannot be prevented by action at a pre-trial conference or by a charge of the
17 Court to the jury." (#19 at 3)(citing Williams v. McDaniel, 119 F.Supp. 247, 252 (D. Nev. 1953)).
18 The Court does not agree with this statement. In Fantasy Inc. v. Fogerty, the Ninth Circuit more
19 recently, applied a less exacting standard in its analysis a 12(f) motion. Specifically, the appeals
20 court upheld a district court's decision to strike allegations in a counterclaim alleging tax fraud, as the
21 allegations pre-dated the applicable statute of limitations, and presented the "serious risks of
22 prejudice to [plaintiff], of delay, and confusion of the issues." Fantasy, Inc. v. Fogerty, 984 F.2d
23 1524, 1528 (9th Cir. 1993). The appeals court additionally noted that the stricken allegations if
24 preserved, created a strong likelihood of unwarranted and prejudicial inferences, and would have
25 "unnecessarily complicated the trial [of the case's underlying copyright claim] by requiring the
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1 introduction of extensive evidence of . . . tax plan agreements and a mass of related documents,
2 potentially adding weeks to the trial.” Id.

3 Here, though the presence of the aforementioned allegations of the misuse of client trust funds
4 has the potential to cause prejudice, confusion, or delay to Plaintiff, an examination of the
5 Defendant’s assertions together with the nucleus of the underlying case, suggests that said assertions
6 not be stricken. Pasionek’s allegations concerning the misuse of client trust funds may have some
7 relation to his misrepresentation claim. Accordingly, the Court finds that the Plaintiff’s Motion to
8 Strike should be denied as to paragraph 29 of the Counterclaim.

9 **B. Paragraph 30**

10 Paragraph thirty alleges that Bolick and Boyer prepared and presented fraudulent financial
11 statements on behalf of a company in which Robert L. Bolick owns a partial interest—the Bolick
12 Boyer & Nelson Office Building (“BBNO”). The pleadings demonstrate that the only direct
13 relationship between Bolick and Boyer and BBNO however, is that Bolick and Boyer are tenants of
14 the building owned by BBNO.

15 Defendant’s allegations that the Firm prepared fraudulent financial statements for BBNO are
16 too remote from the substance of the underlying litigation to outweigh the prejudice, delay, and
17 confusion that may result if Defendant is allowed to pursue discovery regarding the claims.
18 Defendant’s allegations regarding Bolick & Boyer’s submission of fraudulent financial statements on
19 behalf of BBNO to obtain financing, even if true, are nonresponsive and immaterial to the underlying
20 dispute. The Court is cautious of transparent attempts to prolong litigation, open up spurious
21 discovery issues, or that may unnecessarily waste time, expense, resources or cause undue prejudice.
22 See U.S. v. Degayner, 2008 WL 4613084 (M.D. Fl., October 16, 2008); Taylor v. Community
23 Associates, Inc., 2005 WL 757263 (E.D.La., March 30, 2005). Thus, the Court finds that the
24 Plaintiff’s Motion to Strike should be granted as to paragraph 30 of the Counterclaim.

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1 **IV. Conclusion**

2 Accordingly, **IT IS HEREBY ORDERED** that Plaintiff's Motion to Strike (#14) is
3 **DENIED** in part as to paragraph 29, and **GRANTED** in part as to paragraph 30.

4 **IT IS FURTHER ORDERED** that paragraph 30 of Defendant's Counterclaim shall be
5 stricken pursuant to Fed. R. Civ. P. 12(f).

6 DATED this 24th day of February 2011.

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9 Kent J. Dawson
United States District Judge